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DEPARTMENT OF LAW

No. 3.

AN ESSAY.

Members of the staff of the
Prothonotary of the Courts
of Common Pleas of the
County of Philadelphia.

INTRODUCTION.

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from the field of statutory law to that of history and to browse in the latter without restraint. One is prone to amplify, far beyond its force, the maxim, "*Origo rei inspicit debet*," (Coke-Littleton, 248*b.*); and to multiply without benefit the ancient authorities when the subject is in truth living and practical.

HISTORY.

There is no need, in introducing an action which has its own special regulations in a single commonwealth, to do more than refer to the fact that replevin is among the oldest forms of procedure known to the law. Glanville speaks of it as well known in his time, and gives the form of the writ. It was originally commenced by a writ issuing out of the Court of Chancery, directed to the sheriff. The delay which attended the application to Chancery for an original writ in every case impaired the efficiency of the remedy. This was obviated by the statute of Marlbridge (52 HEN. III, C. 21, 1267), by which the sheriff acquired jurisdiction in replevin of any value in like manner as possessed by him under an original writ. By the statute of West. II, C. 2, 1285, the sheriff was required, before delivering the property to plaintiff, to exact from him, in addition to the common law pledges for prosecution, security also for a return of the property to the defendant if the plaintiff were defeated in his suit and the return were adjudged. It should be noticed that this requirement, in effect, still obtains.

Perhaps no clearer statement can be found as to the origin and growth of replevin than that of Bond Serjt. in *Evans v. Brander* 2 H. Black 547:

The remedy by distress was originally substituted in lieu of the forfeiture of the land, which in the strictness of the old feudal law was occasioned by the non-performance of the service. As this remedy was less powerful than the forfeiture, the lord was entitled to keep the thing distrained till the tenant offered gages and pledges for the payment of the rent, or the performance of the service. But notwithstanding the offer of gages and pledges, if the lord persisted in detaining the distress, the tenant was obliged to resort to the writ of replevin, in which he complained that the defendant had taken and unjustly detained the goods against gages and pledges, the form of which is still preserved in declarations in replevin.

It may be well to refer also in this free and rapid résumé to the statute of 11 Geo. II, C, 19, 1738, by which the sheriff was required in cases of distress for rent to exact from plaintiff, before making replevy, a bond of two sureties in a sum double the value of the goods distrained, conditioned to prosecute the suit and make return of the property when return was adjudged. This bond took the place of the former pledges in the cases in which it was required.

These general remarks are to be found so easily and in so many books that separate citations are omitted.

NATURE AND SCOPE.

The word replevin mean a re-delivery to the owner of the pledge or thing taken. By replevin the owner of goods unjustly taken and detained from him may regain possession thereof through the medium of and upon application to the sheriff upon giving him security to prosecute an action against the person who seized the goods.

Blackstone asserts that it only lies against a distrainer (3 Bl. Com. 145), but this has been denied in decisions and in text-books.

Upon this debated question the note to Appendix 2 in Mr. Heard's edition of Stephen on Pleading is very interesting, but not more admirable than the opinion of Coleridge J. in *Mennie v. Blake* 6 E. & B. 842. There are many other discussions of the right to a replevin in England in cases other than distress, but these two authorities are ample and adequate for our purpose.

It may further be noticed, as was said by Van Ness, J. in *Pangburn v. Patridge* 7 Johns. 140, that "the old authorities are that replevin lies for goods taken *tortiously* or by a *trespasser*, and that the party injured may have replevin or trespass, at his election." This never was the rule in this State.

Mr. Heard, (App. 2 CXI *supra*) says:

Pennsylvania, alone, perhaps, among the states of the Union possesses the most rational and effectual method of proceeding in actions of replevin that could possibly be devised.

If for "method of proceeding" in this sentence, we substitute "principle" the praise would perhaps be well deserved.

In Morris on Replevin (Third Edition) 52, it is said, that—

As used in this state, it "may be defined to be the remedy for the unlawful detention of personal property by which the property is delivered to the claimant by giving security to the sheriff to make out the injustice of the detention or return the property."

This action differs from all others in some material points, in that the plaintiff is put in possession of the chattels in dispute before any trial: Another peculiarity was that a return of these chattels was made to the defendant upon his showing in the course of the cause that he was entitled thereto. Compare it with detinue in which the plaintiff seeks to recover the goods in specie or the value thereof, also damages for the detention, and we see how this varies from replevin in which the first step is to take the goods. Contrast it with trover, in which there is no recovery of personal property in kind but only damages for the unlawful conversion of such property.

STATUTES.

Fortunately, or unfortunately, in Pennsylvania, until a recent date, replevin was almost free from statutory regulation. The second section of the Act of April 3, 1779, entitled "An Act declaring replevins, attachments, judgments and executions, in certain cases, to be erroneous and void," is as follows:

All writs of replevin granted or issued for any owner or owners of any goods or chattels, levied, seized or taken in execution or by distress, or otherwise, by any Sheriff, Naval Officer, Lieutenant, or Sub-Lieutenant of the city of Philadelphia, or by any county Constable, Collector of the public taxes, or other officer acting in their several offices, under the authority of the State, are irregular, erroneous and void; and all such writs may and shall, at any time after service, be quashed (upon motion) by the court to which they are returnable, the said court being ascertained of the truth of the fact by affidavit, or otherwise.

The third section provides:

The court besides quashing the said writs, may and shall award treble costs to the defendant or defendants in such writs; and also, according to

their discretion order an attachment against any Prothonotary or Clerk who shall make out or grant any such writ, knowing the same to be for goods or chattels taken in execution, or seized as aforesaid.

This statute has been sustained by the Supreme Court of Pennsylvania as in full force and validity in the comparatively recent case of *Taylor v. Ellis*, 200 Penna. 191, in which Mr. Justice Brown cites with approval the words of Judge Rogers in *Shaw v. Levy*, 17 S. & R. 99, in approval of the act.

The Act of 1779, however, is simply prohibitive and in no sense prescribes procedure. We therefore search for regulative enactments. There seem to be only two. The Act of 1705, (1 Sm.L. 44, §12) provides that it shall be lawful for the justices to grant writs of replevin in all cases whatsoever where replevins may be granted by the laws of England, and the Act of March 21, 1772, only authorizes the sheriff to exact security from the plaintiff in cases of replevin on distress.¹ It is interesting in view of the second act to notice the English statute of George II above mentioned.

Our courts, however, early exceeded the limits of the first mentioned statute. The general rule that replevin will lie wherever one man claims goods in possession of another was announced in *Weaver v. Lawrence*, 1 Dallas 156, 1785.

SCOPE.

The scope of this action is thus described by Judge Paxson in *Miller v. Warden, Frew & Co.* 111 Penna. 300:

The action of replevin lies in Pennsylvania for the property of one person in possession of another, whether the claimant ever had possession or not, and whether his property be absolute or qualified, provided he has the right of possession: *Harlan vs. Harlan*, 3 Harris 507. See also *Mead vs. Kilday*, 2 Watts 110; *Young vs. Kimball*, 11 Harris, 193.

But replevin cannot be maintained without showing either a general or special property in the plaintiff together with the right of immediate possession, *Railroad Co. v. Ellsey*,

¹ See Bright. Purdon Dig. or P. & L. Dig. Title "Replevin."

85. Penna. 283, cited by the lower court in *Strong v. Dinniny*, 175 Penna. 586.

There are many illustrations in the reports of this State of the breadth and what may be called the malleability of this action.

A few are cited herein.

DECISIONS.

In *Charlotte Furnace Co. v. Stouffer*, 127 Pa. 336 (1889), it was held that: Replevin will lie for an inclined plane connecting a railroad with defendant's ore mines, and located partly on land belonging to defendant, which was built by the plaintiff under an agreement that the defendant should have the use of it for a certain compensation during a determinate period, and which at the expiration of that period the defendant refused to deliver to the plaintiff. An agreement to pay a compensation for the use of a structure erected upon land, being prima facie inconsistent with ownership thereof by the person so agreeing, is evidence against him of a title to the structure in the person who is to receive the compensation, even though as to the land occupied, the latter were tenant, and the former landlord. (Agreement inconsistent with right of landlord to claim fixture, though this was trade fixture.)

In *Ferguson v. Rafferty*, 128 Pa. 337 (1889), there was a sale of timber and the logs were to remain as security that the vendee would pay for them. They were taken away from the land, and it was held that the unpaid vendor, whose security had thus been taken from him, could maintain replevin for these logs.

In *Neff v. Landis*, 110 Pa. 204 (1885), a minor obtained a large amount of cigars by stating that he was of age, and that his father was going to back him. Both of these statements were untrue. So positively did he make them that he would have been liable to arrest in criminal proceedings for obtaining goods under false pretenses. The seller of the cigars disaffirmed the sale on the ground of the fraudulent representations of the minor and brought

replevin for the cigars. It was held that the action would lie. In other words, he had a right of possession, which he put into force through the action of replevin.

There are many cases in which a vendor, from whom goods have been obtained by fraud, may sue in assumpsit, waiving the fraudulent representations, or he may disaffirm the contract and bring replevin in order to get back the specific goods themselves. There must be an actual statement or false representation. It is not enough that the man gets credit and knows that he is insolvent. His mere knowledge of his insolvency is not such fraud as will set aside the sale. There must be some artifice, trick, or false pretense, in order to entitle the vendor to bring replevin. (See *Rodman v. Thalheimer*, 75 Pa. 232 (1874), cited and approved in *Wessels v. Weiss*, 156 Pa. 591).

In *Bush v. Bender*, 113 Pa. 94, (1886),—Bender was a farmer and had three horses for sale. Bush bought the three horses for \$355. He paid \$10 earnest money. The horses were left in a hotel yard while Bender and Bush were arranging as to the payment of the balance of the money. Someone on behalf of Bush fraudulently took the horses away, and Bender brought an action of replevin against Bush. It was held that replevin would lie for the horses as the seller never lost his right to possession.

Replevin has been used to enforce the right of stoppage *in transitu*. See *Hays v. Mouille*, 14 Pa. 48 (1850).

There are cases where one has given goods of any kind to a tradesman for manufacture, and has tried to get his goods back again. Of course he must pay the lien which the bailee has for the work done on the goods. See

Brown vs. Dempsey, 95 Pa. 243 (1880),

Mathias vs. Sellers, 86 Pa. 486, (1878),

The latter is a leading case on that question in Pennsylvania. It holds that a bailor may not maintain replevin for goods which he has delivered to a manufacturer or tradesman, without first paying the amount of the common law lien. This condition, however, may be waived according to the

general doctrine of tender that when a party declines to accept payment or performance, except in a particular way, to which he is not entitled, he cannot insist that the action is prematurely brought, *Agnew J. Macky v. Dillinger*, 73 Pa. 85. This case further stands for the proposition that—

Set-off does not exist in replevin, but when the goods are the subject of a lien or charge, the charge upon them can be enforced by way of recoupment, for the charge is inseparable from the thing itself, and therefore, when the value of the thing is to be allowed in damages, the charge necessarily reduces the damages, by way of a recoupment, in order to do justice to both parties.

It has been said that title to land cannot be tried in an action of replevin. Incidentally title to land has come into controversy. In the case of *Elliott v. Powell*, 10 Watts 453 (1840), replevin was brought for certain wheat in the sheaf. The plaintiff proved that he had fenced and cleared the ground, that he had put in the crop and was in possession of the premises, and that the defendant had carried away the grain. The defendant offered to prove that the land was the defendant's and that the plaintiff when he sowed was a mere trespasser, and that the defendant entered, took possession of the premises, and cut the grain because the land was his. It was held that that was a permissible defence, if true.

Elliott v. Powell was criticized in *Lehman v. Kellerman*, 65 Pa. 489, in which Agnew J. quotes from the opinion of Justice Rogers in *Harlan v. Harlan*, 3 Harris 507:

" * * * when it appears *that in truth it is a trial of title*, then it is properly ruled that *replevin is not the proper action*."

But see Act of 15 May 1871, P.L. 268, as to replevin for property severed from the realty.

There are some cases in this State which bear upon the question of the confusion of goods. In *Henderson v. Lauck*, 21 Pa. 359 (1853), there was an agreement for the sale of grain, to be paid for on the delivery of the last load. The grain was hauled to the vendee's mills, emptied in a heap with other grain, and after the delivery of the last

load, the purchaser failed to pay. Then a writ of replevin was issued, and the grain in the common heap was replevied. The point was made on the trial that if the plaintiff could not identify the grain that he had delivered, he could not recover. The court thought that if the grain could be identified with reasonable certainty, the writ would lie.

A very interesting case is *Wilkinson v. Stewart*, 85 Pa. 255. The plaintiffs and the defendants had large oil tanks situated near each other. Johnson & Co. had an oil refinery near said tanks with the right of storage in each of them to the extent of 2000 barrels of oil. The tank of the defendants was connected with the refinery by means of a pipe and was used as supply tank by Johnson & Co., who drew oil for the refinery and replaced it in whole or in part from time to time. Finally they connected the two tanks by a pipe, and the plaintiffs' tank being higher than the defendants' tank, the oil flowed from the former to the latter. When Johnson & Co. drew oil from defendants' tank for their refinery, they replaced it on separate occasions with oil drawn from the plaintiffs' tank. Johnson & Co. acquired no title to the oil nor did the defendants. It was held, Paxson J. giving the opinion, that the plaintiffs had a clear right to follow and reclaim their oil by a writ of replevin unless prevented by the fact of its mixture with other oil of the defendants.

Had the character of the oil been so essentially changed by the mixture that one barrel would not be the equivalent for another barrel, the case would have presented a different question—one that we are not now required to pass upon. We are not prepared to say that the defendants are wholly without responsibility for the mixture. They allowed Johnson & Co. to use their tank as a supply or feeder for their refinery; to draw out oil at will, and replace it. This necessarily involved a mixture of the oil. The right of the owner of oil in tanks or pipe lines to take out his aliquot part was distinctly recognized in *Hutchison vs. Commonwealth*, *Supra*, (1 Norris 472).

It is not intended in this essay to make a digest of cases, but simply to cite the foregoing decisions as examples of the scope of the action of replevin in this State.

TWO DIVISIONS OF SUITS IN REPLEVIN AND NEW LEGISLATION.

Until the Act of April 19, 1901, P.L. 88, to be presently considered, all cases of replevin were of necessity divided into two classes, namely, replevin not on distress for rent, and replevin in cases of distress. The first were based upon the principle quoted in *Miller v. Warden, Frew & Co.*, supra, while in the suit between landlord and tenant, there was in the main an adherence to the practice of the common law.

The legislation just referred to is "An Act relating to replevin, and regulating the practice in cases where the writ of replevin is issued." It is believed that this can be profitably studied only by taking up its sections or parts of sections separately.

THE BOND.

Before citing the words of the first section, it will be well to recur for a moment to the act of March 21, 1772, which provided for security from the plaintiff only in cases of distress. Notwithstanding the absence of an enabling statute to that effect, it has always been the practice in this State to take a bond from the plaintiff in every case whether on a distress for rent, or otherwise. This has been sanctioned by many decisions and has been an unquestioned practice.² The following was the old form of the bond in use:

"KNOW ALL MEN BY THESE PRESENTS, That we..... are held and firmly bound unto....., Esq., Sheriff of the City and County of Philadelphia, in the just and full sum of..... dollars, lawful money of Pennsylvania, to be paid to the said..... Esq., his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made and done, we do bind ourselves and each of us, our heirs, executors, and administrators, and every of them, jointly and severally, firmly by these presents. Sealed with our seals, dated this.....day of....., in the year of our Lord, one thousand, nine hundred and..... The condition of

²Morris on Replevin, (Third Edition), 269.

this obligation is such that whereas the above-bounden.....
(hereinafter called plaintiff) having obtained a certain writ of
 replevin, issued out of the Court of Common Pleas, No....., for the
 City and County of Philadelphia, as of.....Term.....No.....
 tested at Philadelphia, the.....day of....., against a
 certain.....(hereinafter called defendant) of the County aforesaid
commanding the said sheriff that he should replevy and cause
 to be delivered to the said plaintiff..... Now, if the above-
 bounden plaintiff.....shall and will prosecute his suit against
 the said defendant.....with effect, and shall and will make
 return of the goods, if return of the same shall be adjudged, and shall and
 will also, from time to time and at all times hereafter, well and sufficiently
 keep and save harmless and indemnify the above named sheriff and his
 officers, and his or their heirs, executors, and administrators, and every
 of them, of and from all manner of suits, action and actions, cost and
 charges whatsoever that shall and may accrue to him, or them by reason
 of the replevy and delivery aforesaid, that then the above obligation to be
 void and of none effect, otherwise to be and remain in full force and
 virtue.

Sealed and delivered
 in the presence of us :

.....(L. S)

.....(L. S)

It was decided that in order to support an action upon this bond it was not necessary that a judgment *de retorno habendo* should have been entered in the replevin suit. Such judgment was not essential to a recovery, and the several stipulations of the bond are distinct and independent and a breach of any one of them constituted a forfeiture. See *Bank v. Hall*, 107 Pa. 583, (1885) which followed the leading case of *Gibbs v. Bartlett* 2 W. & S. 29 in which there is the oft-cited, learned and careful opinion of Rogers J. who stated among other things, "It is admitted that the writ *de retorno habendo* is not in use." It was therefore held in *Bank v. Hall* that the plaintiffs were entitled to assess their damages in an action on the bond although they were not assessed in the replevin suit. It was sufficient to prove a breach of any one of the conditions of the bond. This last point has been reiterated in several cases. See e.g. *Watterson Admr. v. Fuellhart*, 169 Pa. 612 (1895).

The first change made by the Act of April 19, 1901, alters

the former procedure at once in the material subject of the plaintiff's bond.

THE PLAINTIFF'S BOND.

This is so prominent a feature in replevin that particular attention to its form and substance under the former practice was necessary in order to consider the change effected by the more recent legislation just referred to. It is the primary subject, as will be seen in the following copy of the first part of the Act of April 19, 1901 :

Section 1. *Be it enacted, &c.* That before any writ of replevin shall issue out of any court of this Commonwealth, the person applying for said writ shall execute and file with the prothonotary of the said court a bond to the Commonwealth of Pennsylvania, for the use of the parties interested, with security in double the value of the goods sought to be replevied, conditioned that if the plaintiff or plaintiffs fail to maintain their title to such goods or chattels, he or they shall pay to the party thereunto entitled the value of said goods and chattels, and all legal costs, fees and damages which the defendant or other persons, to whom such goods or chattels so replevied belong, may sustain by reason of the issuance of such writ of replevin. Writ of replevin

Observe that the obligee is the Commonwealth of Pennsylvania instead of the sheriff. The suit in case of a breach will be like that upon official bonds and not in the name of the sheriff to the use of the successful defendant in the replevin (see *Clark v. Morss*, 142 Pa. 311); and the conditions are seen at a glance to differ from those of the old bond. Moreover, the new bond is not to remain in the custody of the sheriff, but it is to be filed with the prothonotary of the court out of which the writ shall issue and must be executed and filed before the replevin can go out. By a few words a vital change was thus made in the procedure.

The natural inquiry of the reader of this first section is, Who shall determine the amount and pass upon the responsibility of the sureties? It is necessary to pass to Section 8 in order to answer this question. It is as follows:

Section 8. The prothonotary shall, in the first instance, The Bail.
fix the amount of bail, and approve or reject the security offered; his action in either regard shall be subject to revision by the court. In order to determine the amount of bail the plaintiff shall make an affidavit to the value of the goods and chattels, which value shall be the cost to the defendant of replacing them, should the issue be decided in his favor. The court may, upon motion, increase the amount of bail required; may require new bail, if for any reason the old bail has become insufficient, and may enter a non pros. against the party in default, if he has the goods and chattels, and its orders be not complied with, or may permit the substitution of bail for that already given and enter an exonaturatur on the bail bond.

This form of affidavit and approval of sureties is used in Philadelphia:

<p>.....</p> <p style="text-align: center;">V.S.</p> <p>.....</p>	}	<p>COURT OF COMMON PLEAS, No.</p> <p>..... Term, 19..... No.....</p> <p>Surety for</p> <p>Amount of Property Secured, \$.....</p> <p>Penal sum of bond, \$.....</p>
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.....being about to become surety in the above entitled case, and being duly.....according to law deposes and says:

1st. I reside at
and my occupation is.....

2nd. I am the owner of real estate in the County of Philadelphia as follows:.....

3rd. The value of said real estate is \$.....and the rent.....
..... It is assessed for the purpose of taxation, at the value of \$..... and is so assessed in my name.

4th. There are.....incumbrances against the said real estate as follows:.....

.....and there is no other judgment binding the said land or mortgages, ground rent or other incumbrance of any kind, except those above named

5th. The title to the said real estate is in my own name, and the same is not subject to any trust.

6th. I obtained the said real estate in.....by... ..
from.....and my deed therefor is recorded.

7th. There are.....judgments against me.

8th. I am not surety in any other case, or for any public officer.

(Signature of Surety).....

Sworn and subscribed before me.....190....

.....Prothonotary.

³Notice of application for approval of this surety was given to the....
by writing on the.....day of.....
 190.....

Attorney for.....

The above-named deponent is approved as surety in the above case.
*Judge*.

It will be observed that the power of the prothonotary in regard to the bail is not final, but may be revised by the court, as it seems, without delay, from the use of the word "upon motion."

In *Hill v. Mervine*, No. 2, 13 Dist. 582, it was held by the Common Pleas of Monroe County, opinion by Erdman, P. J., that the failure to make this affidavit, where a sufficient bond had been entered, was not fatal to the writ, and that court declined to quash because of the absence of the affidavit of bail. Contra, *Ammerman v. Stone*, 11 Dist. 726.

Whether the words of the 8th section are directory or mandatory does not seem as yet to have been passed upon by either the Superior or Supreme Court, but certain it is that a careful prothonotary or deputy will not allow the writ of replevin to go out of his office without such affidavit, for the duty of the officer is judicial in determining the amount of bail and by the terms of the act must be based upon the affidavit of value. The attorney for the plaintiff should not fail to draw such an affidavit, which need contain only a few words and he should also file a praecipe in the usual form.

SAMUEL C. IRON,	}	C. P., No.....
<i>vs.</i>		Term.....
JAMES CHARLES STEEL,		No.....

Prothonotary, C. P.

Issue writ of replevin for five boxes of merchandise⁴ of a value of \$600, marked as follows :

W. E. M.

W. B.

Returnable the first Monday of.....

.....*Attorney for Plaintiff*

⁴This cannot apply to cases of replevin otherwise than on distress, because the effect of it would simply be to notify the defendant to make such a disposition of the goods and chattels as to avoid their being taken under the writ. This previous notice would be likely to insure a return of "eloigned."

The return day should be named, and not written "sec. leg." because in all counties in which the courts under the authority of the act of June 11, 1879, have made rules providing that writs for the commencement of actions may, at the election of the party suing out the same, be made returnable on the first Monday of the next term, or the 1st, 2d, 3d or 4th Monday of any intermediate month, the plaintiff's attorney should designate the return day. Thus, it will be seen that there are three papers, præcipe, affidavit of value, and bond, preliminary to the actual issue of the writ of replevin.

The difference above pointed out between the old and new practice may be further shown by comparing the old form of the writ itself with the new form.

OLD WRIT

COUNTY OF PHILADELPHIA, ss.

Replevin

THE COMMONWEALTH OF PENNSYLVANIA,

To the Sheriff of the County of Philadelphia, Greeting:

If.....
 plaintiff make you sure of prosecuting.....claim with effect
 against.....defendant.....then WE COMMAND
 you, that you cause the following described goods and chattels, to wit:—

'(Or one horse of the value of....., or one piano, or as the case may be, with brief description of the chattels.)

to be replevied and delivered to the said plaintiff.....and that
 you put the said defendant.....by sureties and safe pledges,
 so that.....be and appear before our Judges at Philadelphia, at
 our Court of Common Pleas, No....., of the County of Philadelphia,
 there to be held the.....Monday of.....next, to
 answer the said plaintiff.....of a plea, wherefore the said de-
 fendant.....took the goods and chattels aforesaid, the property of
 the said plaintiff.....and the same unjustly detain against
 sureties and safe pledges, &c. And have you then there this writ.

WITNESS, the Honorable....., President
 Judge of our Said Court, at Philadelphia, the.....day of
in the year of our Lord, one thousand nine hundred and....
Prothonotary

NEW WRIT

COUNTY OF PHILADELPHIA, ss.

Replevin

THE COMMONWEALTH OF PENNSYLVANIA,

To the Sheriff of the County of Philadelphia, Greeting:

WHEREAS,
 the Plaintiff.....filed a Bond in double the value of the

goods mentioned in this writ in accordance with the provisions of the act of Assembly, Approved April 19, 1901, to prosecute.....claim with effect against.....
 Defendant, or other person in whose possession the same may be found, therefore WE COMMAND YOU, that you cause the following described goods and chattels, to wit:—

to be replevied and delivered to the said plaintiff.....
 and that you put the said defendant, or other person or persons in whose possession the same may be found, by sureties and safe pledges, so thatbe and appear before our Judges at Philadelphia, at our Court of Common Pleas No.....of the County of Philadelphia, there to be held the.....Monday of.....
 next, to answer the said plaintiff of a plea, wherefore the said defendant took the goods and chattels aforesaid, the property of the said plaintiff and the same unjustly detain against sureties and safe pledges, &c. And have you then there this writ.

WITNESS the Honorable....President Judge
 of said Court, at Philadelphia, theday of.....
in the year of our Lord, one thousand nine hundred and.....

SECTION 2. If any other person than the defendant named in the writ be found in possession of the goods and chattels he shall be duly served with the writ, and his name added as a party defendant to the cause. The writ shall command the sheriff to serve the party in possession, as well as the defendant named. Service of the writ.

This is on all fours with the 9th section of the service act of July 9, 1901, P. L. 614. The writ of replevin may be served by the sheriff in the county in which it is issued. (a) By taking possession of the goods and chattels described therein, and by serving the defendant, if found, as in the case of a summons; and by adding to the record, and serving as in the case of a summons any other than the defendant who may be found in possession of such goods and chattels, or any of them; or, (b) If the goods and chattels cannot be found, then by serving the writ as in the case of a summons; in which event the cause shall proceed with the same effect as if a summons in trespass had been duly served; and alias and pluries writs may be issued in the same suit, at any time prior to verdict, and said goods and

chattels may be taken by virtue thereof, with the same effect as if taken on the original writ.

The 9th section of the replevin act of 1901 also authorizes alias and pluries writs, and is as follows:

SECTION 9. Alias and pluries writs of replevin may be issued if the goods and chattels be not taken or all the defendants named be not served, and the cause may proceed against defendants in fact served, though the goods and chattels be not found.

Other writs may be issued.

Examples of returns made by the sheriff might be appropriate at this place, but as the forms are well settled and the responsibility is upon the officers, they are omitted.

It may not be superfluous to state (for the benefit of any young lawyer whose eye may light upon these pages), that care is necessary in giving the sheriff instructions in order that he may make no mistake in executing the writ. The plaintiff, or some one for him, should tell where the goods and chattels therein named may be found, and if they are to be picked out from a mass, the client should go or send some one with the deputy for the purpose of identifying the property.

The 3d section of the act of 19 April, 1901, was amended by an act of April 14, 1905, Pamphlet Laws, 163, which is as follows:

AN ACT.

To supplement and amend section third of an act, entitled "An act relating to replevin, and regulating the practice in cases where the writ of replevin is issued," approved the nineteenth day of April, nineteen hundred and one; permitting replevied property to be impounded in certain cases, and regulating the practice in such cases.

SECTION 1. *Be it enacted, &c.*, That the third section of an act, entitled "An act relating to replevin, and regulating the practice in cases where the writ of replevin is issued," approved the nineteenth day of April, nineteen hundred and one, which reads as follows:

Replevin

"The court or, in vacation time, a judge thereof at chambers, may grant leave to any person, upon an affidavit filed that the goods and chattels so replevied belong to him, to intervene as party defendant in such suit; and the defendant or party so intervening may file a counter bond within seventy-two hours after such goods

Section 3, act of April 19, 1901, as amended cited for amendment

or chattels have been replevied, during which time the said goods and chattels shall remain in the possession of the sheriff, and which time may be extended by the court or, in vacation time, a judge thereof at chambers, upon cause shown. Such counter bond shall be given to the Commonwealth of Pennsylvania, for the use of the parties interested, in the same amount as the original bond and with like conditions. Where several parties claim the right to give a counter bond and have possession of said goods and chattels, the party who is in actual or constructive possession of the goods and chattels at the time the writ of replevin was served shall, upon entering the proper counter bond, be entitled to have said goods and chattels," be and the same is hereby amended so as to read as follows:

The court or, in vacation time, a judge thereof at chambers, may grant leave to any person, upon an affidavit filed that the goods and chattels so replevied belong to him, to intervene as party defendant in such suit; and the defendant or party so intervening may file a counter bond within seventy-two hours after such goods or chattels have been replevied, during which time said goods and chattels shall remain in the possession of the sheriff, and which time may be extended by the court or, in vacation time, a judge thereof at chambers, upon cause shown. Such counter bond shall be given to the Commonwealth of Pennsylvania, for the use of the parties interested, in the same amount as the original bond and with like conditions. Where several parties claim the right to give a counter bond and have possession of said goods and chattels, the party who is in actual or constructive possession of the goods and chattels at the time the writ of replevin was served shall, upon entering the proper counter bond, be entitled to have said goods and chattels:

Intervening party

Counter Bond

Where several parties claim right of possession

Provided, That in any action of replevin hereafter to be brought, where the defendant or person intervening in such action, claiming title to the property replevied, shall enter a claim property bond therefor, if the plaintiff, within seventy-two hours after notice from the sheriff of the entry of such claim property bond, by affidavit filed in such action, aver that by reason of the nature of such property, or of any special circumstances connected with his alleged ownership thereof, the actual pecuniary value of such property will not compensate him for the loss thereof, the court or, in vacation time, any judge thereof at chambers, shall order such property to be impounded in the custody of the sheriff, or such other person as the court or, in vacation time, any judge thereof at chambers, may designate, to abide the final determination of the

Claim property bond

Property may be impounded

action ; provided the plaintiff shall exhibit an estimate of the probable necessary charges and expenses of the storage, care or keep of such property pending the final determination of such action, and shall pay, or secure the payment of, such charges and expenses as the court or, in vacation time, any judge thereof at chambers, shall approve.

Estimate of charges etc.

The amount of such security shall be fixed by the court or, in vacation time, by any judge thereof at chambers, and said security shall be approved in the same manner as now provided for the approval of the security entered by the plaintiff on the issuing of the writ of replevin. The bond shall be to the Commonwealth, and shall be for the use of any party interested in the payment of the storage, care or keep of the impounded property.

Security

Upon the final determination of such action, the property so impounded shall be delivered to the party who shall have successfully maintained his title thereto, and the charges and expenses of the storage, care or keep of such property shall be assessed as costs of suit, and shall be recoverable from the unsuccessful party in the same manner as damages and costs are now recoverable in action of replevin.

On final determination

The right given to intervene states a privilege which existed before the passage of the statute. While it was the law that a person in exclusive possession of the goods when the writ was issued and executed should have been named as defendant or co-defendant in the writ, it was the proper practice to allow one who had an interest in the property attached as the goods of another to intervene to defend *pro interesse suo*, *Holmes v. Railroad*, 18 W.N. 429, see *Lawall v. Lawall*, 150 Pa. 626.

The right to file a counter bond given by the 3d section of the act of 1901 is in pursuance of a practice peculiar to Pennsylvania, and perhaps only to one other state. In *Morris on Replevin* pp. 63, 64, the following statement is made:

In England, if the defendant claimed property, the sheriff could not proceed but returned that fact on the writ. Neither the defendant nor the sheriff has any further control over the cause and as a consequence it is said, in some places, that the claim of property is a determination of the suit. This, however, is not altogether consistent with the practice, as stated by Chief Baron Gilbert, or with the form and character of the writ

de proprietate probanda. This writ, all authorities agree, can only be issued at the instance of the plaintiff, upon which an inquest of office is held by the sheriff and if they find against the claim of the defendant then the sheriff is commanded at once to make deliverance to the plaintiff.

* * * * * If, however, the inquest of office is found in favor of the defendant, then there is an end of the suit. Pending this proceeding the property remained in the possession of the defendant.

The practice is thus stated by Justice Grier in *Taylor v. Royal Saxon*, 1 Wall Jr. (U.S.C.C.), at p. 327:

By virtue of the writ of replevin the sheriff seizes the property: it is taken into the custody of the law. But as it would be injurious to both parties that the property should be so retained, the sheriff is ordered by the writ to deliver it into the custody and possession of the plaintiff, on his giving sufficient pledges. If the defendant or party in possession claims title, the sheriff does not hold an inquisition to try the question, nor does any writ *de proprietate probanda* issue: but the defendant is allowed to retain the possession by giving what is called a "claim property bond." When this is done the suit proceeds as a common action of trespass *de bonis asportatis*. The plaintiff recovers in damages the value of the property and the only advantage which he gains by his action of replevin is the security which he has obtained for the damages which he may recover. The delivery to the defendant is final: no *reclorno habendo* ever issues for the delivery of the specific thing to the plaintiff or *withernam* to compel it. In fact, whatever the defendant's title may previously have been, it becomes indefeasible by his "claim property bond" which is substituted for the property.

By *Fisher v. Whoollery*, 25 Pa. 197, *Rockey v. Burkhalter*, 68 Pa. 221, the defendant cannot tender the property afterwards, or even in satisfaction *pro tanto* of the damages claimed. The plaintiff's right, after claim property bond given by defendant, is turned into a mere chose in action and his property in the thing is gone.

It will be seen that by the claim property bond of the former practice and the counter bond of the new statute, the object of the proceeding, so far as the actual taking and retention of the property was sought by the plaintiff, must fail. Even if the plaintiff win his suit after a contest, he could only recover damages in an action upon defendant's obligation. He could not follow and re-take the goods and chattels. In this regard our lauded system of replevin was futile. Amendment has long been needed.

EQUITABLE RELIEF.

At this point the mind diverges naturally from common law to equity. Can there not be found relief in that jurisdiction sufficient to enable one deprived of some article of personal property cherished by affection or association beyond any pecuniary estimate of valuation, to recover and hold such a chattel? The paucity of successful efforts in this State by means of a bill in equity to effect such an object, shows that the courts have not favored the attempts. Hence this new provision for impounding is of great value.

To illustrate, these citations may be profitable:

McGowin vs. Remington, 12 Pa. 56 (1849), Bell J.

Remington, a surveyor in the city of Pittsburgh, intending to engage in other business for the time being, left his plots, plans, drafts and furniture in the hands of McGowin, who had been in his office, it being understood that McGowin should deliver them up again when requested. Remington now complains that McGowin refuses to give up these plans, &c., that they were difficult to replace or procure, and that copies of the same were being made. Held, that equity has jurisdiction; the remedy at law is not adequate, since a claim property bond in an action of replevin would defeat reclamation. That McGowin's breach of confidence is sufficient to call in aid the authority invoked. And, as a court of equity takes cognizance of every object embraced within a suit, the surveying instruments and office furniture stand in the same category with the maps, drafts, &c.; therefore, decree for the delivery of all the chattels made out.

Principle. "Chancery interferes where, from the nature of the subject or the immediate object of the parties, no convenient measure of damages can be ascertained; or, where nothing could answer the justice of a case but the performance of a contract in specie."

Morris's Appeal, 68 Pa. 16 (1871) Sharswood, J.

In 1774, Samuel Morris, then Captain of "The Philadelphia Troop of Light Horse," received from General Washington a general order of discharge. Morris kept possession of this order until his death, when his son took possession. The company sent a resolution to Captain Morris, admitting that they had no claim to the "order." In 1815 the corps was incorporated under the name of "Philadelphia City Cavalry," and as such sought by bill in equity to recover back the "order." Held, they could not; that if there had been originally a bailment the trust had ended since they knew of the adverse holding, and after a failure of forty-three years to claim title their rights had ceased.

This case is of interest to every patriotic heart. It was determined on the question of title, not of equitable jurisdiction.

Beasley vs. Allyn, 12 W. N. C. 90 (1882), Allison, P. J.

The Freshman and Sophomore classes of the University of Pennsylvania engaged in a "bowl fight," and, as neither was victorious, according to agreement presented the bowl to the Philomathean Society. At a subsequent meeting of the Philomathean Society, a motion was passed presenting the bowl to the Sophomore class. Twenty-three members were present, ten did not vote, and eight of the thirteen voting were sophomores. A bill was filed to regain possession of the bowl. Demurrer on grounds, (1) want of equity, (2) adequate remedy at law, (3) frivolity, overruled, the court holding that the associations were more valuable than the actual cost of the bowl. Remedy at law not adequate, since bond could be filed, and also because possession in replevin must be exclusive. Nor was "frivolity" a defence, for if a wrong had been done, it should be righted.

East End Reformed Presby. Cong. vs. Milligan, 40 Pitts. L. J. 7 (1892), Stowe, P. J.

Defendant, a minister, was suspended, but continued in possession of the corporate seal and the property of the church. The minority of the congregation brought a bill to recover back the property and the corporate seal. Demurrer. Held, trespass not adequate and a criminal action would produce scandalous and unseemly conflicts. Demurrer overruled.

Edelman vs. Latshaw, 159 Pa. 644, (1894).

Latshaw, by false representations, induced Edelman to sell certain shares of stock, which was of no particular value, nor was it bought for any special purpose. A bill in equity was filed to compel a reconveyance. Refused as money damages were adequate.

Squires vs. Howell, 12 Super. Ct. (1899), Orlady, J.

A Mrs. Howell, by will, bequeathed "her fur coat" to Mrs. Kennie, which coat at the time of the donor's death was in the possession of the defendant, who refused to give it up. The executor by bill in equity sought to recover the coat. It was not averred that the defendant had no title, or that the legatee was related by blood so that the coat could be an heirloom. Bill dismissed, it not appearing that this coat differed in any material respect from any other fur coat, or that any sentimental feelings were attached to it. Nor was there any trust obligation attached to it, or any tort or fraud practiced by defendant in securing possession.

Orbin vs. Stevens, 13 Super. Ct. 591 (1900), Beaver, J.

A flag was presented to the Eighty-Fifth Regiment Pennsylvania Volunteers at the time they organized. When the regiment was mustered out in 1864, the flag was delivered to Stevens, a member of the regiment for safe keeping. Some of the survivors of the regiment organized the Eighty-fifth Regiment Association, which was unincorporated. This association filed a bill asking that the flag be turned over to them. Bill dismissed, not because equity had no jurisdiction, but because the plaintiff association showed no title. That, if the flag belonged to the regiment, it was owned by its members jointly, and as defendant had possession, plus an equal title with the other members, he could keep it.

There is a pathos in the statement of the defendant's regard for the flag which was the subject of the dispute.

TIME FOR ENTRY OF A COUNTER BOND.

In place of the unwritten custom which allowed 48 hours for the entry of a claim property bond, there is now substituted the period of 72 hours, with the right of extension of the same by the court. Attention is briefly called to the obligee, amount and conditions of the counter bond, of which the following is a copy as used in Philadelphia county:

FORM OF COUNTER BOND.

KNOW ALL MEN BY THESE PRESENTS, That we.....

 are held and firmly bound unto the Commonwealth of Pennsylvania for the use of the parties interested in the just and full sum of.....

 dollars, lawful money of Pennsylvania, to be paid to the said Commonwealth of Pennsylvania for the use as aforesaid, their certain attorney, successors or assigns; to which payment, well and truly to be made and done, we do bind ourselves and each of us, our heirs, executors and administrators, and every of them, jointly and severally, firmly by these presents. Sealed with our seals, dated this.....day of.....
 in the year of our Lord, one thousand nine hundred and.....
 WHEREAS,.....
 having obtained a certain Writ of Replevin issued out of the Court of Common Pleas No....., for the County of Philadelphia of.....
Term, 190....., No....., tested at Philadelphia, the.....day of.....against.....

 commanding the Sheriff of Philadelphia County that he should replevy and cause to be delivered to the said plaintiff certain goods and chattels mentioned in said writ of the value of.....AND WHEREAS, the said defendant has claimed property in the said goods and chattels, wherefor delivery of the same cannot be made to the said plaintiff.
 NOW THE CONDITION OR THIS OBLIGATION IS SUCH, That if the above bounden.....
 defendant, in said recited Writ of Replevin fail to maintain.....
 title to such goods or chattels.....shall pay to the party thereunto entitled the value of said goods and chattels, and all legal costs, fees and damages which the plaintiff.....or other persons to whom such goods or chattels so replevied belong, may sustain by reason of the issuance of this Writ of Replevin. then this obligation to be void and of none effect, otherwise to be and remain in full force and virtue.

Sealed and delivered
 in the presence of us :

.....(L.S.)
(L.S.)

Since the old claim property bond is now abandoned, it will be sufficient to briefly state in contrast with the new statutory counter bond, that it was taken by the sheriff in his name as obligee and that its conditions were, (1) to well and truly deliver up the said goods and chattels (Not in force, see *Chaffee v. Sangston*, 10 Watts 265); (2) to abide the judgment of the court; (3) to save harmless and indemnify the sheriff.

APPROVAL OF BOND.

Who shall approve the counter-bond?

It has been held (by Erdman, P. J., C. P. Monroe Co.) in *Hill v. Mervine*, No. 1, 13 Dist. 582, that the sufficiency of the bond must be determined by the sheriff and that his responsibility for taking an insufficient bond has not been changed by the act of 1901.

It is true that there is a gap in the third section of the amendment of 1905, *supra*, and no provision is made on this important point, but the obligee is the Commonwealth and "the conditions are to be like," and the "amount" is to be the "same," as those in the original bond.

Further, by the fourth paragraph, the security in the case of impounding "shall be approved in the same manner as now provided for the approval of the security entered by the plaintiff in the issuing of the writ of replevin."

From these changes in the conditions, and from the substitution of the Commonwealth for the sheriff, and from the just quoted extract from the latest act, it is difficult to see any reason for making the officer responsible under a non-statutory rule, especially when the Supreme Court in *Waterson, Admr. v. Fuellhart*, 169 Pa. 612, in the opinion by Mr. Justice Dean, regarded the liability of the sheriff without rigor or severity:

We are not inclined to extend a hardship, only tolerated because of established precedent, to a case not clearly within the precedent. There is no imperative reason which requires us to hold that a faithful officer, when he executes a replevin writ, shall, at the same time, insure the plaintiff against loss from a contingency which by care he could not foresee;

the loss should fall on the plaintiff, the party interested, and not on him who has no interest in the subject of the litigation.

We therefore decide in this case, that if the sheriff, in the exercise of care and judgment, accepted this claim property bond, with sureties, at the time solvent, or that he had reason to believe solvent, and there was no apparent danger of future insolvency, and permitted defendant to retain possession, he did all that the law required of him; the plaintiff can exact nothing more.

It is believed that from the evident intent of the Act of 1901 to balance the respective liabilities of plaintiff and defendant on their separate original or counter bonds, it must be good practice to have the prothonotary approve the counter bond.

At all events there exists, apparently never repealed, legislation for Allegheny County and for Philadelphia County (Act of April 10, 1873; P.L. 776), which should answer the question within these two jurisdictions. This legislation requires that all bonds given to the sheriff, in his official capacity, as indemnity for executing the writs therein named (replevin *inter alia*), shall be justified before the judge of the proper court and approved by said judge, and when the prothonotary shall certify said justification and approval to the sheriff, the bond shall become the property of the successful party to the suit, without recourse to the sheriff who may have executed said process or received said bond as indemnity. There is a like act for Allegheny County, May 19, 1871, P.L. 986, except that bonds are justified before the prothonotary.

CASES OF DISTRESS.

Can a counter bond be taken in replevin *sur distress* for rent? This was answered in the negative in *Anthony v. Rife*, 6 Dauphin 202, opinion by Jacobs J. On principle it cannot, for where in an action of replevin the property is retained and bond given by the defendant, the plaintiff's right to the property is turned into a chose in action: his property in the thing is absolutely gone,—

W. D. Porter J. 16 Sup. 474. And it was directly ruled in *Baird vs. Porter*, 67 Pa. 105, opinion by Williams J., that if he (landlord) took the

cattle as a distress for rent, he had neither a general nor special property in them, nor any right to their possession after the service of the writ of replevin. It was his duty, under the law regulating the right of distress, to deliver up the cattle, as required by the writ, and, as his security for the rent, to look to the bond which the sheriff was required to take before delivering the distress.

The landlord distrained for the purpose of collecting a claim, not to assert property or right of possession.

This broadens into a much more important question. It is this: Does the Act of April 19, 1901, apply only to cases in which title to goods or the right of possession is in controversy?

It was held by the Common Pleas of Monroe County in an opinion by Staples, P. J., *Crawford v. Fulmer*, 14 Dist. 487, (July 10, 1905), that the contention affirming the question could only prevail upon the theory of the exception of cases of replevin brought by a landlord against a tenant for goods distrained by the latter being made by implication:

1. That the Act of April 19, 1901, is simply to try title, and that there can be no such issue between landlord and tenant. 2. That there is no provision in the said Act whereby the landlord may plead and have tried the rent in arrears.

He disposes of the first by the analogy of bailor and bailee, and of the second by suppositious pleadings.

The tenant in his declaration or statement may allege that the property replevied was his and set forth the facts upon which he expects to sustain his title or right of possession to the property replevied. The landlord may reply in an affidavit of defence, in which he may allege the plaintiff was in arrears for rent amounting to the sum of \$., that the same was due and unpaid, and under the law he had distrained the property in question for the purpose of securing the said rent in arrears. Under pleadings of this nature, the only issue would be that of rent in arrears, and the landlord only having a lien upon the property, if rent in arrears was found, it would be within the power of the court to mould the verdict and enforce it in accordance with equitable principles.

The unwisdom of a distinction in writs of replevin in order that certain writs may be issued and regulated by the Act of 1772 and other writs by the Act of 1901 is strongly intimated. There is, it must be conceded, something persuasive in Judge Staples' opinion.

A contrary opinion, able and learned, had been previously written by McConnell, J., C. P. Westmoreland Co. in *Williams v. Rutherford*, 14 Dist. 282 (June 14, 1904) which was followed by C. P. 3 of Philadelphia in *Rosenfeld v. Goldberg*, 14 Dist. 381, opinion by Von Moschzisker, J. (June 3, 1905).

It is submitted that the decision of the two last mentioned courts seems to be better supported by the history of replevin in this State and by reasoning. Is the law to be scientifically administered, or is practice to be governed by rough and ready notions of expediency, by implication, by imaginary supplying of ellipses, and by disregard of well-settled procedure?

In the two divisions of cases on distress and cases not on distress, there is an essential difference in the right of action—in the substantial object of the suit. The landlord cares nothing for the ownership of the goods and chattels which he or his bailiff has seized. With certain exceptions,—*e.g.*, on grounds of trade or of public convenience, the goods of a stranger on the demised premises are liable to distress for rent. The purpose of the levy is to enforce the collection of rent. The title of the plaintiff, the tenant, is not in issue; his replevin is to resist the claim for rent. As was said in *Williams v. Smith*, 10 S. & R. 202, an action for goods distrained for rent is not an action to determine the ownership of the property, but it is to determine the amount of rent due and the value of the goods distrained. An avowry admits ownership of the goods in the plaintiff, Beeber, J., *Ball v. Penn*, 10 Sup. 544.

In pursuance of this basal thought, notice that the 10th and 11th sections of the Act of March 21, 1772; 1 Sm. L. 370, (P. & L. Dig. Title Landlord & Tenant, pl. 23 and 24, Bright. Pur. Title Replevin, pl. 2 and 3), made the brief code in this State regulating the action. For many years these sections have been in force and have been useful, and sufficient. The 11th section provided specifically for a bond "in every replevin for rent * * * conditioned for prosecuting the suit with effect, and without delay, and for duly

returning the goods and chattels distrained, in case a return shall be awarded before any deliverance be made by distress." As said by Judge McConnell, (*Williams v. Ruth-erford*, supra), "This Act of 1772 has been an integral part of the system of landlord and tenant law of this State."

The 11th section further provided for an appraisalment, then

* * * * * a bond in double the value of the goods distrained (such value to be ascertained by the oath or affirmation of one or more credible persons), * * *

The 8th section of the Act of 1901 directs the plaintiff to make an affidavit of value, with no mention of the Act of 1772.

Can these few enactments, old, notable, and followed for so many years, be deemed repealed by implication in the meagre general expressions of the Act of 1901, or by the sweeping clause of the 13th and final section? There is no inconsistency in the two procedures. They do not necessarily cover the same subject. Each can remain in force without any conflict with the other.

If possibly any one should argue that the Act of April 19, 1901, is an amendment of the Act of March 21, 1772, such a position would fall at once under the prohibition of section 6, article III of the Constitution.

The Act of 1772, moreover, in the 10th section, approved of an avowry and cognizance in replevin, following common law practice in cases of distress; the defendant, as has often been said, became the actor. He filed what was a counter-declaration. The plaintiff pleaded to the avowry.

Do the declaration under the Act of 1901, "which shall consist of a concise statement of his (plaintiff's) demand, setting forth the facts upon which his title to the goods and chattels is based," and the affidavit of defence take the place of the narr., the avowry and cognizance recognized in the above 10th section of the Act of March 21, 1772?

Can the words of section 6, "the question of the title to or right of possession of the goods and chattels," dexterously be converted into the issue of no rent in arrear? If

they can, it is suggested that the plaintiff (tenant) in his declaration ought to set forth the claim of the defendant (landlord), his distress, his alleged right to the rent, and the plaintiff's ground of denial, (that is, set up and knock down the supposed justification of the landlord), not merely state the facts of plaintiff's title, for it is not of the slightest consequence what that is, by purchase or gift or otherwise, if he *do not owe the rent*.

Beyond this, however, the proceedings for judgment for want of an affidavit of defence, the judgment for the goods and chattels, "admitted to be the property of the plaintiff," (and indeed all are, for that is not the controversy), the judgment for those as to which the court may adjudge the affidavit insufficient—in short, the imitation of the Act of May 25, 1887, and supplements relating to assumpsit—are incongruous and not applicable from the nature of the relation of the parties in cases of distress. In the absence of explicit terms of change the old pleadings should stand.

This view is further shown by stating the uniform course in rent cases. If not authorized by the Statute of 7 Car. II. C. 7, it has been in accord with that. The verdict has always been in the form of finding the amount of rent in arrear and also the value of the goods. Judge Peirce's opinion in *Rosenthal v. Lehman*, 6 W. N. C. 559 is to this effect and also that the statute is in force in Pennsylvania. See on this last point *Klein v. McGeogh*, 12 W. N. C. 128. Thus there are really two findings by the jury.

The difference already specified is also supported by the opinion of Judge Arnold in *Krumbhaar v. Stetler*, 10 County 12. He quotes authorities to the effect that the sale of the replevied goods on an execution issued against the plaintiff in an action of replevin *sur distraint*, does not prevent the defendant from recovering the value of the same goods in an action on the replevin bond. The unsuccessful plaintiff becomes liable for the rent which may be collected by a *fieri facias*, while his sureties are answerable to the amount of the rent and the damages and double costs under the Act of March 21, 1772, section 10.

Perhaps the words at the beginning of the Act of 1901, "That before *any* writ of replevin shall issue," &c., afford the strongest ground for the position that the statute applies to all cases of replevin. Two answers seem to be fairly opposed to this construction. If the force of the word "any" be allowed *prima facie* to include every writ, then it is fair to construe it as only including every writ of replevin within the meaning and purview of the Act, not a writ in a suit not contemplated by the Act in its various sections and in its entirety. Or if the first section be interpreted to cover cases of tenant and landlord, then that section separately and only can govern in replevin *sur distress*, and the statute be construed to apply to such cases only so far as the bond of the plaintiff is required by the terms of that section.

These distinctions might be further extended, but in the absence of a ruling by the higher courts, the Westmoreland and Philadelphia conclusions seem sound.

Replevin in a case of bailee v. bailor is unlike that in a case of tenant v. landlord. In the one the plaintiff seeks to reclaim the property because it has been taken from him, notwithstanding his alleged right to hold it under his lien. In the other case the plaintiff is the owner who claims the goods against the technical lien of a distress upon which the landlord depends. The relations of the parties are different in form and in substance from those of bailee and bailor.

The suggestion of inconvenience is of little weight in view of the defferent forms of action still in use. We are in an easy condition in comparison with the numbers that formerly existed. A glance at the writs abolished by 3 and 4 Wm. IV. C. 27 Sec. 36 or the actions cited by Pollock & Maitland (Hist. Com. Law, pp. 562 &c.) will diminish the fanciful difficulty of two kinds of procedure in replevin.

SECTION 4. The plaintiff in such action shall file a declaration, verified by oath, which shall consist of a concise statement of his demand, setting forth the facts upon which his title to the goods and chattels is based. The defendant or party intervening may enter a rule upon plaintiff to file such declaration within fifteen days, and the plaintiff failing so to do, a judgment of non pros. shall be entered, which judgment shall operate to forfeit said bond.

Plaintiff to file
declaration.

STATEMENT.

A. } C. P. No. 6,
 vs. } Dec. 1905,
 B. } No. 15.

COUNTY OF PHILADELPHIA ss.

The plaintiff claims in this action the following:

.....
 which he avers that the defendant, to wit, at the County aforesaid took and wrongfully detained [detains] against sureties and pledges. Said goods are the absolute property ⁵ of the plaintiff, who acquired title thereto by purchase from.....on the..... day of.....and the said.....then and there delivered the said goods and chattels to the plaintiff. Said purchase was made with the plaintiff's own money and neither said defendant nor any other person or persons has any right, title or interest therein.

The said defendant took and unjustly detained [detains] the said.....to the damage of the plaintiff.....dollars, and therefore he brings suit.

.....
Attorney for Plaintiff

⁵Alter as per facts. If qualified state wherein.

Query. Ought not the particulars of the taking to be averred?

COUNTY OF PHILADELPHIA, ss.

....., the above named plaintiff, being duly....., says that the matters alleged as the basis of his claim in the above statement are true.
and subscribed, &c.

ESSENTIALS OF A STATEMENT.

The foregoing is merely a tentative draft of a statement. It will be remembered that the Supreme Court has said in reference to the new departure in actions of assumpsit that the statement—

must be self-sustaining; that is to say, it must set forth in clear and concise terms a good cause of action, by which is meant such averments of fact as, if not controverted, would entitle him, (plaintiff), to a verdict for the full amount of his claim. * * * All the essential ingredients of a complete cause of action must affirmatively appear in the statement and exhibits which are made part thereof. Opinion by C. J. Sterrett, *Bank vs. Ellis*, 161 Pa. 241. See *Peale vs. Addicks*, 174 Pa. 543.

Therefore in view of the words of the 4th section, "setting forth the *facts upon which his title* to the goods and

chattels is based," the old averments of the common law *narr.* may be deemed not sufficiently specific.

Compare this suggested statement with the old form of declaration, viz:

C. D. } C. P., &c.
vs. }
A. B. }

COUNTY OF PHILADELPHIA, ss.

A. B. was summoned to answer C. D. of a plea wherefore he took the goods and chattels of the said C. D. and unjustly detained the same against sureties and pledges, &c. And thereupon the said C. D. by E. N. his attorney complains for that the said defendant heretofore to wit, on the.....day of.....at Philadelphia in the County aforesaid in a certain.....took the goods and chattels to wit [here enumerate the articles as in the writ] of him the plaintiff of great value, to wit, the value of.....and unjustly detained the same against sureties and pledges, until &c., To the damage of the plaintiff.....and therefore he brings his suit.

.....
Attorney for Plaintiff.

See *Thomas vs. Pierce*, 1 Chester Co. 403, for "&c" s.

See as to declaration, 2 Tr. and H. Pr. sections 1739-40-41.

In "*detinuit*," if Sheriff return summoned, replevied and delivered.

In "*detinet*," if claim property bond, or eloiigned.

ENTRY OF JUDGMENT FOR WANT OF AN AFFIDAVIT OF DEFENCE, &c.

SECTION 5. The defendant or party intervening shall, within fifteen days after the filing of such declaration, file an affidavit of defense thereto, setting up the facts denying plaintiff's title and showing his own title to said goods and chattels; and in event of his failure so to do, upon proof that a copy of said declaration was served upon him or his attorney, judgment may be entered for the plaintiff and against the defendant or party intervening, which judgment shall operate to forfeit any counter bond given by him.

Affidavit of
Defence.

Entry of
judgment.

To consider the innovation made by this section it is well to at once read:

SECTION 5, (Continued). The court may enter judgment, with like effect, for want of a sufficient affidavit of defense, or for such goods and chattels as may be admitted to be the property of the plaintiff in the affidavit of defense, or may enter judgment, with like effect, for such

goods and chattels as to which the court may adjudge the affidavit of defence insufficient. And in event of judgment being rendered in favor of the plaintiff for a portion of such goods and chattels replevied, he may proceed to recover such goods and chattels by writ of *retorno habendo*, or the value thereof after assessment of damages on a writ of inquiry of damages issued, and the case shall be proceeded in for the recovery of the balance.

This section ignores the distinction made in the Act of May 25, 1887, P.L. 271, commonly called the "Statement" act, between actions *ex contractu* and actions *ex delicto*, and requires that novelty, an affidavit of defence in an action of tort. The case of *Corry v. R.R.*, 194 Pa. 516, positively defining the difference between cases of contract and tort under the Act of May 25, 1887, cannot govern in suits of replevin.

The intent of the 4th and 5th sections of the Act of April 19, 1901, is to assimilate the practice in replevin to that in the new assumpsit, as it not only follows the original provisions of the act of 1887, but those of the subsequent statutes, which may now be referred to.

There is the Act of May 31, 1893, P.L. 185, permitting judgment to be entered for the amount admitted to be due and execution for the collection of the same, the case to be proceeded in for the recovery of the balance of the demand of the plaintiff. This is fully treated by Judge Arnold in *Roberts v. Sharp*, 161 Pa. 185. This was followed by the Act of July 15, 1897, P.L. 276:

If the court adjudge any portion or portions of an affidavit of defence to be insufficient the plaintiff may take judgment for such portion and have execution for the collection of the same, and the case shall be proceeded with to recover the balance as to which the court shall adjudge the affidavit to be sufficient.

Good practice requires the plaintiff to specify the part as to which he claims the affidavit to be insufficient and to set this forth in the rule to show cause. *Shea v. Wells*, 8 Sup. 511. Or as stated in *Pierson v. Krause* 208 Pa. 115, a better practice is an adjudication by the court in its own words of what portion or portions it adjudges insufficient.

This precision is perhaps even more necessary in the case of goods and chattels.

SECTION 5 (concluded). If the defendant has been duly summoned and does not appear at the return-day of the writ, the plaintiff, having filed his declaration, may file a common appearance for the defendant, and proceed in the cause as in other cases.

In case defendant does not appear.

This course was provided in Rule 34 of the Philadelphia Court of Common Pleas. There is an excellent description of the practice in cases of replevin in which no appearance has been entered by a defendant in 2 Brewster's Practice, Section 2189. The mode of obtaining judgment in such a case is therein set forth:

The only resource left to the plaintiff is to issue his præcipe to the prothonotary thus:

<i>A</i>	}	C. P. No.
vs.		Term.
<i>B</i>		No.

SIR:

Enter a common appearance for the defendant in the above case.

C. D.,

Attorney for Plaintiff.

To the Prothonotary, Court of Common Pleas.

The prothonotary then enters the appearance of C.D., the plaintiff's attorney, for the defendant. This is called entering a common appearance, which can only be entered by the defendant or by some attorney acting for the defendant. When the common appearance is entered as above, C.D. then serves upon himself, as attorney for defendant, a copy of the narr. and rule to plead and at the proper time takes judgment against the defendant for want of a plea.

Under the Act of 1901, the "concise statement" takes the place of the *Narr.* and the rule is entered on the defendant to file an affidavit of defence (not a plea) in fifteen days. A copy of the statement, with notice of this rule thereon endorsed, is then served as shown in Br. Prac. above.

In Philadelphia County a custom exists of also posting in the prothonotary's office a copy of such notice to the defendant to file an affidavit of defence.

Why this curious performance has been recently reinforced by statute is not clear. There seems no reason why the right to take judgment outright for want of an appearance, as given by Sections 33 and 34 of the Act of June 13, 1836, P.L. 568, should not have been made to include the action of replevin. It seems better not to enter a common

appearance, but if the defendant, who does not appear after service of the writ, can be found, to serve him with a copy of the statement and notice of the rule.

SECTION 6. The declaration and affidavit of defence The issues.
as originally filed, or as amended by leave of court, shall constitute the issues under which, without other pleadings, the question of the title to, or right of possession of, the goods and chattels as between all the parties shall be determined by a jury.

Therefore in the class of suits clearly covered by this statute, and perhaps in all actions of replevin, if the Supreme Court decide that this Act of April 19, 1901, applies also to those between tenant and landlord, *sur distress*, all pleadings of the old practice are abolished.

The affidavit of defence is now the only plea permitted to the defendant. This is a novelty, for what was so well said by Mr. Justice Mitchell in *Muir v. Preferred Accident Insurance Co.*, 203 Pa. 338, has been a long and settled rule, to wit:

An affidavit of defense in Pennsylvania practice is no part of the pleadings, and has an entirely different function. It is a mere step or incident of the proceedings required in order to prevent a summary judgment by default. * * * * * The wholly different function of a plea is to raise and make certain the issue on which the controversy between the parties is to be fought out. With this the affidavit of defense has nothing to do and it may be entirely disregarded and the case put at issue on other grounds.

Tempora mutantur!

FORMER PLEAS.

Prior to the Act of 1901, under the general issue of replevin when the plea was *non cepit* alone, the plaintiff was not required to prove his title. The goods were confessed to belong to him. See note 7, 2d. Tr. & H. Pr. Sec. 1745, but, as stated by Strong, J. p. 438, 35 Pa., in *Reinheimer v. Hemingway*:

The plea of property imposes upon the plaintiff the necessity of establishing his title and his right to the possession; and that right must, of necessity, be exclusive in order to warrant a delivery of the property to him.

"Non cepit," by itself, disclaims title by the defendant, *Wiley v. McGrath*, 194 Pa. 498. Hence the two pleas have usually been pleaded together. Judge Thompson said in *Cummings v. Gann*, 52 Pa. 484—

There was no inconsistency in practice in putting the pleas of non cepit and property together as was done in this case. It is the constant practice.

The attorney for a defendant in preparing his affidavit of defence should recall these two differences.

To keep in mind the actual divergence in rights and attitude of the defendant in the two divisions of suits in replevin, the avowry and cognizance of landlord and bailiff may be contrasted with the pleas just mentioned.

ILLUSTRATION—AVOWRY AND COGNIZANCE.

<i>John Blank</i>	}	C. P. No. 6.
vs.		Dec. T. 1905.
<i>Peter Sterling, Landlord,</i>		No. 53.
<i>Henry Doe, Bailiff.</i>		

And the said defendants, by Aaron Lex, their attorney, come and defend the wrong and injury when, etc., and the said Peter Sterling in his own right well avows, and the said Henry Doe as bailiff of the said Peter Sterling, well acknowledges the taking of the goods and chattels in the said declaration mentioned in the said dwelling-house wherein they were contained, and that they, the said defendants, did justly take the same, because they say that the plaintiff, for a long time, to wit, for all the time during which the rent hereinafter mentioned to be distrained, was accruing due, and from thence until and at the same time when, etc., held and enjoyed said dwelling-house and premises, as tenant thereof, to the said Peter Sterling, by virtue of a certain demise thereof, made on the.....day of.....190..., as follows, to wit: [Here set out the demise, (in words of lease if in writing), the rent, how much due, when due, by whom due], and because the sum of.....of the rent aforesaid, for the said space of.....ending as aforesaid on the said.....day of.....in the year aforesaid, and from thence until, and at the same time when, etc., was due and in arrear from the plaintiff to the said Peter Sterling. He, the said Peter Sterling, well avows and the said Henry Doe, as bailiff of the said Peter Sterling, well acknowledges the taking of the said goods and chattels, in the said dwelling-house in which, etc., and justly, etc., as for and in the name of a distress for the said rent, so due and in arrear to the said Peter Sterling as aforesaid; which said rent still remains in arrear and unpaid; and this the defendants are ready to verify; wherefore they pray judgment, and a return of the goods and chattels, together with their damages, according to the form of the statute in such case made and provided to be adjudged to them, etc.

To this the plaintiff files pleas—*e.g.*, *non tenuit*, *non demisit*, no rent in arrear, *non est factum*, or as his case may require.

SECTION 7. If the title to said goods and chattels be found finally to be in a party who has not been given possession of the same, in said proceeding, the jury shall determine the value thereof to the said successful party, and he may at his option, issue a writ in the nature of a writ of *retorno habendo*, requiring the delivery thereof to him, with an added clause of *fieri facias* as to the damages awarded and costs ; and upon failure so to recover them, or in the first instance, he may issue execution for the value thereof and the damages awarded and costs ; or he may sue, in the first instance, upon the bond given, and recover thereon the value of the goods and chattels, damages and costs, in the same manner that recovery is had upon other official bonds.

When the title is in party not in possession.

DAMAGES.

The rule as to damages is stated in 2 Tr. & H. Pr. Sec. 1764 :

The judgment for the plaintiff, where the goods are delivered to him, is, that he recover his damage for the taking and unjustly detaining, &c., with full costs, but he is not entitled to damages for any depreciation in their value during the period of suit, because he may sell them at any time ; but any deterioration of the goods whilst in the defendant's possession, after an unlawful taking, is a proper subject of damages. When they are not delivered to him, he recovers their value in damages, and also damages for their deterioration ; a case of this kind is where the defendant has claimed property and given a property bond ; there, the plaintiff, counting, as he must, in the detinet, and having succeeded at the trial in establishing that the goods belong to him, shall have judgment to recover all in damages, as well the value of the goods as damages for taking them and costs.

The jury, however, may go farther. The right to do so is thus expressed by Judge Dean in *Wiley v. McGrath*, 194 Pa. 498 :

That punitive damages in replevin may be allowed in all cases where there have been peculiar circumstances of outrage, oppression, and wrong in the taking or detention was settled by this Court in *McDonald v. Scaife*, 11 Pa. 381.

These rules are in marked contrast with the recovery in a case between landlord and tenant, *sur distress* for rent, in which the jury finds the amount of rent and the value of the goods ; and by the Act of March 21, 1772, the successful defendant may also recover double costs of suit, but

only however when the judgment is coextensive with the avowry. *Prescott v. Otterstatter*, 85 Pa. 534. See *Park v. Holmes*, 28 W. N. 288. This difference in finding damages exemplifies the division of suits of replevin into two classes.

MEANS OF SATISFACTION.

The option is given in this 7th section to the successful party to elect one or more means of trying to reap the result of the suit. The first is a revival of the old writ (*de*) *retorno habendo*. The second has a suggestion of the Act of 17 Chas. II. C. 7 (see *Rosenthal v. Lehman*, 6 W. N. 559, and *Klein v. McGeogh*, 12 W. N. 128.) The third follows the Pennsylvania cases. See *Bank v. Hall*, *supra*.

There have been few cases of final process under the first, but from the form in manuscript in the office of the Prothonotary of the Common Pleas Court of Philadelphia County, the following copy has been made of a *retorno habendo* and *fiari facias* for costs:

COUNTY OF PAILADELPHIA,
THE COMMONWEALTH OF PENNSYLVANIA } ss.

To the Sheriff of the County of Philadelphia, Greeting:

WHEREAS, A. B., lately in our Court of Common Pleas No. for the County of Philadelphia was summoned to answer C. D. of a plea whereof he took [articles enumerated] of the value of.dollars lawful money of Pennsylvania of the goods and chattels of him [or her] the said C. D. and the same unjustly detained against sureties and safe pledges as he [or she] alleged.

And the said C. D. afterwards made default in our said Court before our said Judges at Philadelphia, wherefore it is considered in our same Court before our said Judges that he [or she] and his [or her] pledges for prosecuting should be amerced and that the said A.B. should depart the Court without day and have return of the [articles enumerated] aforesaid.

THEREFORE, We Command You that without delay you return the said [articles enumerated] above mentioned to the said A. B., and you shall not deliver the said goods above mentioned at the complaint of the said C. D. without our writ which shall expressly mention the said Judgment and in what manner you shall execute this writ made known to our Judges at Philadelphia at our said Court of Common Pleas No. for the City and County of Philadelphia there to be held the first Monday of.Anno Domini One Thousand, &c.

AND WE ALSO COMMAND YOU, That of the Goods and Chattels, Lands and Tenements of the said C. D. in your Bailiwick you cause to be levied as well the sum of.dollars.cents

lawful money of Pennsylvania which the said A. B. in our said Court was adjudged for.....costs and charges by.....expended in and aboutdefence in the Premises whereof the said C. D. is convict as appears of Record, &c. And have you those moneys before our Judges aforesaid to render to the said A. B. for his costs and charges aforesaid and this writ.

Witness the Honorable.....President
of our said Court at Philadelphia the.....day of.....
in the year of our Lord One Thousand nine hundred and.....
.....Pro Prothonotary.

Sections 8 and 9 have been mentioned under a previous topic. (See p. —).

SECTION 10. No action shall be brought upon any bond given in accordance with the provisions of this act unless commenced within five years after the final determination of the suit in which the bond was given. Action on bond.

The writer abstains from a discussion of the practice in cases between tenant and landlord for two reasons. First, If the higher courts decide that the Act of April 19, 1901, applies to those suits, then a review of the old procedure would be futile. Secondly, If the final judgment be that the new procedure affects only suits involving title or right of possession, then no recital will be required of the settled practice as found in such books as Brewster's Practice, Troubat & Haly's Practice and Jackson & Gross on Landlord and Tenant.

Recent examples of separate codes in Pennsylvania,—*disjecta membra* of procedure: for instance, the "Statement" Act of May 25, 1887, the Mechanics' Lien Law of June 11, 1901, and supplement of April 17, 1905, and this change in replevin, can hardly be said to promote simplicity or accuracy or celerity in the disposition of causes. If codification be a crying need, the petition and answer prescribed for proceedings in the Orphans' Court might be studied as a framework for a homogenous system. That has been followed for many years to the advantage of clients and lawyers. In the County of Philadelphia it has worked admirably. In this city the volume of business in the administration and distribution of decedents' estates has been immense. The court constituted under the constitution of 1874 has wisely and justly decided innumerable questions of

law and of fact involving difficult legal problems and enormous values.

Is not the real demand, however, for repealing rather than creative legislation? It was said by Justice Dean in *Waters v. Wolf*, 162 Pa. 153, "Laws seem to be born full-grown about as often as men are." The great experience of Mr. Choate justified him in expressing the opinion: "These codes of procedure, which have taken the place of a simple practice regulated by rules of court, have become so cumbersome and impossible, they afford and create such opportunities for delay, they provide for and contemplate such countless preliminary motions, each a litigation in itself, that there seems no way out but to cut the Gordian knot and return to the ancient practice." (Rep. Am. Bar Assn. Vol. XXI, p. 304.) Our reforms (?) of procedure in Pennsylvania may not have reached such a crisis, but surely there is now an absence of simplicity and uniformity.

The reports in this State contain so vast a number of cases upon this one branch of practice that it is impossible to write any account of replevin, however concise, without many citations. In the desire for brevity the present writer has felt like adopting the plan which, it is said, was followed by the celebrated Timothy Dexter of Rhode Island. The story goes that Mr. Dexter hated marks of punctuation and therefore printed a book from which these useful dots and specks and jabs were wholly omitted, but several pages at the end were filled with an indiscriminate assortment of them and the remark that the reader might sprinkle them over the text as he pleased—a sort of pepper and salt to suit the individual taste. In the serious business, however, of trying to state law there is a dependence upon authorities which every lawyer whose aim is rather to be accurate than to be original, must deeply feel. Moreover, one who has made the *tortuous* journey with many turns cannot tell the story of his wayfaring without frequent mention of the landmarks and guideposts which he has examined and on which he has relied.

JOHN W. PATTON.